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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FREDERICK MICHAEL TURNER,

Defendant and Appellant.

D039014

(Super. Ct. No. SCD156069)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed.

A jury convicted Frederick Michael Turner of carjacking (Pen. Code, § 215, subd. (a))¹ and attempted robbery (§§ 664/211). Turner waived jury and admitted serving one prior prison term (§§ 667.5, 668), 19 prior serious felony convictions (§ 667, subd. (a)(1))

¹ All statutory references are to the Penal Code unless otherwise indicated.

and 19 strike priors.² The court sentenced Turner to 55 years to life in prison: 25 years to life for carjacking with two strike priors enhanced five years for a prior serious felony conviction, and 25 years to life consecutive for attempted robbery with two strike priors. It struck the prior prison term enhancement (§ 1385). Turner contends the trial court erred in excluding evidence of his mental history. He also contends he was denied effective assistance of counsel. We affirm the judgment.

FACTS

At approximately 11:15 p.m. on June 30, 2000, Turner approached a parking cashier at Horton Plaza. He pushed her to the ground and demanded money. She resisted and he ran. After being confronted by a security officer, Turner ran again. He jumped into a car waiting at a traffic signal, pushed the driver out and drove away. The car was found eight days later and property was missing from it.

² The court did not expressly advise Turner of the possible consequences of the admissions. Before a court may validly accept an admission of a prior conviction allegation, the court must advise the defendant of the rights he is waiving and the consequences of his admission. (*In re Yurko* (1974) 10 Cal.3d 857, 863-864.) However, *Yurko* error is not reversible per se. Reversal will occur if the record does not "affirmatively demonstrate that the [admission] was voluntary and intelligent under the totality of the circumstances." (*People v. Howard* (1992) 1 Cal.4th 1132, 1178.) Here, Turner admitted the prior convictions after jury trial on the substantive charges and advisement by the court that he had a right to a hearing on the prior convictions charges, the right to counsel, the right to cross-examine, the right to subpoena witnesses, and the right to testify. While the trial court erred in failing to specifically advise Turner of the consequences of the admissions, the court substantially complied with the advisement requirement and nothing in the record indicates a different result would have occurred had the court specifically advised him of the consequences of the admissions. The error is harmless. (See *Chapman v. California* (1967) 386 U.S. 18.)

Turner testified and admitted the crimes but claimed he heard the voices of Drug Enforcement Administration (DEA) agents and others telling him to take the money and the car.

At an in limine hearing, the court granted the People's motion to exclude testimony from Turner about his prior hospitalization and diagnosis of his mental condition without an expert foundation, but it allowed him to testify about his mental condition at the time of the commission of the crimes as he perceived it. The defense did not call any of the three mental health experts who had examined Turner.

DISCUSSION

I

Turner argues his testimony about past hospitalization for mental problems was relevant to the issue of whether he had the specific intent to steal. However, evidence of past hospitalization without the reason for the hospitalization is irrelevant. Testimony by Turner of the reason for the hospitalization would have been either hearsay or opinion and not the proper subject for lay testimony. (See *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 848-849.) Lay witnesses may only testify to facts, not opinions. (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1332.) Had Turner desired to introduce evidence of his history of hospitalization for mental problems, he could only do so through expert testimony. The trial court did not abuse its discretion in limiting Turner's testimony to facts within his knowledge.

II

Turner contends he was denied effective assistance of trial counsel through failure to call expert witnesses to testify about his mental condition and failure to object during closing argument to theft of personal property from the carjacked car.

Defendants have a constitutional right to effective counsel in criminal cases. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) The burden is on the defendant to prove he received ineffective assistance of counsel. To do so, the defendant must show counsel failed "to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate," and that counsel's acts or omissions prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.) Turner first argues competent counsel would have called an expert to testify about his mental condition. However, whether to call a witness is a tactical decision that will not be interfered with if based on any knowledgeable choice. (*People v. Floyd* (1970) 1 Cal.3d 694, 701.) Here, Judith Meyers, a clinical psychologist, said in her summary and recommendation that Turner was feigning mental illness. Although Turner heard voices despite his taking medications, Meyers believed he exaggerated his psychiatric symptoms and these were not consistent with psychiatric symptoms in general. She believed that he was malingering mental illness to avoid severe punishment for his crimes.

Dr. Haig Koshkarian, a psychiatrist, concluded that Turner has a long history of crime and drug abuse. Koshkarian diagnosed Turner as having an antisocial personality disorder and polysubstance dependence. The doctor believed that Turner's hallucinations that the DEA agents had been talking to him was consistent with a psychotic disturbance

of thought, but the doctor further believed that it appeared that Turner exaggerated his symptoms to his benefit. Dr. Koshkarian believed that at the time of the crimes it was possible that Turner was delusional and hearing voices, but Dr. Koshkarian did not believe Turner's criminal acts were in response to following orders he thought were coming from the DEA.

Dr. Katherine DiFrancesca, a psychologist, believed Turner suffered from mental illness not fitting the symptom picture typically seen in schizophrenics but questioned the reliability of Turner's claims because he appeared to exaggerate his symptoms. She found Turner exhibited bizarre mannerisms at the time of the crime, but his claim of hallucinations was not supported by others. Dr. DiFrancesca found that Turner has a long history of delusional beliefs regarding the DEA, but the delusions were not related to his commission of the crimes. She found no rationale based in the delusions to commit the robbery and carjacking.

During the hearing on the motion in limine, the court mentioned that if it permitted Turner to testify as to his past mental history, the prosecution could use these reports in rebuttal. Given this record, it appears that Turner's trial counsel made a reasonable tactical decision not to call the experts.

Quoting closing argument, Turner argues his counsel chose not to call expert witnesses not because of a tactical decision but rather due to lack of knowledge of the law. In closing argument Turner's counsel argued that it was up to the prosecution to prove each element of the crime, including specific intent. Turner's trial counsel argued Turner did not have to call expert witnesses on his mental condition because "the issue is

whether the prosecution proved the formation of the intent and whether that mental disease or defect had nothing to do with it." Citing *People v. Saille* (1991) 54 Cal.3d 1103, Turner argues that during closing argument his trial counsel displayed ignorance of the law that the defendant has the burden of introducing expert testimony regarding his mental illness in order to raise the defense that he did not harbor a particular mental state. In *Saille*, the issue was whether the trial court erred in failing to instruct the jury that voluntary intoxication could negate express malice so as to reduce a murder to voluntary manslaughter. The court noted that a statutory change in the definition of malice aforethought did not prevent a defendant from showing voluntary intoxication precluded him from having an intent to unlawfully kill. (*Id.* at pp. 1116-1117.) The court did not say or infer that a defendant must present expert testimony on the issue to raise the defense that his mental state precluded him from forming an intent. The record does not reflect that Turner's trial counsel was ignorant of the relevant law.

Turner also argues his trial counsel showed ineffectiveness by failing to object to the prosecutor's closing argument statement that Turner, who was an admitted addict, said he walked away from the stolen car without taking the valuable property in the car. The prosecutor has wide latitude in arguing to the court or a jury. (*People v. Beach* (1983) 147 Cal.App.3d 612, 628.) It appears the prosecutor referred to the property missing from the car while challenging the credibility of Turner's testimony that he attempted to rob the Horton Plaza parking cashier because he was hearing voices. After mentioning the stolen property, the prosecution said:

"But it doesn't matter here because it really isn't required that I prove to you that the defendant was the one that took all that stereo stuff out of the car or the personal property because you don't even have to get to that in order to determine whether or not the defendant committed the crime of attempted robbery and carjacking. I'm just saying, you know, when you're deciding how much weight you're deciding whether or not he was telling the truth, the fact of the matter is he didn't really act like you would expect a typical drug addict to act, or he didn't admit it when he was up on the stand, and it's because he wasn't telling the whole truth when he was up on the stand. He, I'm sure, had a hand in disposing of the contents of the car."

This closing argument does not reflect prosecutorial misconduct. A competent trial attorney need not make fruitless objections. (*In re Lower* (1979) 100 Cal.App.3d 144, 149; fn. 3.) Even if competent counsel would have objected to the argument, it is not reasonable that in light of the overwhelming evidence of guilt, the argument had any impact on the jury's verdict. If prosecutorial misconduct occurred, and if reasonable counsel would have objected, any error was harmless. (See *Chapman v. California* (1967) 386 U.S. 18 [constitutional error harmless beyond a reasonable doubt].) Turner has not shown he was denied effective assistance of counsel.

DISPOSITION

The judgment is affirmed.

KREMER, P. J.

WE CONCUR:

BENKE, J.

McDONALD, J.